



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8

999 18TH STREET - SUITE 300

DENVER, CO 80202-2466

<http://www.epa.gov/region08>

June 14, 2004

Ref: 8MO

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Patrick Goggins
Vermilion Ranch Co.
4419 Vermilion Road
Billings, Montana 59105

Re: Findings of Violation and Administrative
Order for Compliance
Docket No. **CWA-08-2004-0048**

Dear Mr. Goggins:

Based on our review of all available information, the United States Environmental Protection Agency ("EPA") has determined that you are in violation of the Clean Water Act, as amended ("CWA"). The CWA requires that an authorizing permit be obtained from the United States Army Corps of Engineers prior to the discharge of dredged or fill material into waters of the United States. See, 33 U.S.C. § 1311. Waters of the United States include both surface waters and wetlands as defined by 33 C.F.R. § 328.3.

Specifically, you have discharged fill material into waters of the United States without authorization under the CWA. These discharges of pollutants into the Yellowstone River, both above and below the ordinary high water mark, have occurred on your property at a site located in section 6, Township 2 North, Range 28 East, Yellowstone County, Montana.

Enclosed is a document entitled "Findings of Violation and Administrative Order for Compliance" ("Order") which specifies the nature of the violations and describes actions necessary in order for you to achieve compliance with the CWA. EPA's authority for such action is provided under section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3). Pursuant to the Order, within five days after you receive the Order you must inform EPA in writing of your intent to fully comply with the Order.

The CWA requires the Administrator of EPA to take all appropriate enforcement action necessary to secure prompt compliance with the CWA and any order issued thereunder. Section 309 of the CWA authorizes a variety of possible enforcement actions, including filing of a civil or criminal action, administrative penalty action, and/or debarment from Federal contracts and/or



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loans for any noncompliance with the CWA or an order issued pursuant to the CWA. Please be advised that failure to comply with the requirements of the Order is a violation of the Order and may be enforced through the mechanisms referenced above. Please also be advised that the issuance of this Order does not preclude civil or criminal actions in the U.S. District Court pursuant to sections 309(b) or (c) of the CWA, 33 U.S.C. §§ 1319(b) or (c), or assessment of civil penalties pursuant to sections 309(d) or (g) of the CWA, 33 U.S.C. §§ 1319(d) or (g), for the violations cited in the Order or for any other violations that Patrick Goggins and/or the Vermilion Ranch Co. may have committed prior to or may commit after the issuance of the enclosed Order.

EPA has agreed to notify small businesses of their right to comment on regulatory enforcement activities at the time of an Agency enforcement activity pursuant to the Small Business Regulatory Enforcement and Fairness Act ("SBREFA"). SBREFA does not eliminate your responsibility to comply with the Act or this order, nor does it create any new rights or defenses under law. We have enclosed a SBREFA information sheet containing further information on compliance assistance resources and tools available to small businesses.

Please review the Order carefully. If you have any questions, the most knowledgeable people on my staff are Sheldon Muller, Enforcement Attorney, at 303-312-6916, and Kris Knutson, Enforcement Officer, at 406-457-5021.

Sincerely,

SIGNED

Carol Rushin
Assistant Regional Administrator
Office of Enforcement, Compliance
and Environmental Justice

Enclosures

1. Findings of Violation and Administrative Order for Compliance
2. SBREFA Information Sheet

cc: Mr. Allan Steinle, Corps, w/enclosures
Mr. John Arrigo, MDEQ
Mr. Jeff Ryan, MDEQ
Mr. James Darling, MFWP
Ms. LaVerne Ivie, YCD

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

IN THE MATTER OF:)	FINDINGS OF VIOLATION AND
)	ADMINISTRATIVE ORDER FOR
Patrick Goggins)	COMPLIANCE
Vermilion Ranch Co.)	
4419 Vermilion Road)	
Billings, MT 59105)	Docket No. CWA-08-2004-0048
)	
)	
Respondents.)	
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I. STATUTORY AUTHORITY

1. This Findings of Violation and Administrative Order for Compliance (“Order”) is issued pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency (“EPA”) by section 309 of the Clean Water Act (“CWA”), 33 U.S.C. § 1319. This authority has been properly delegated to the Assistant Regional Administrator of the Office of Enforcement, Compliance and Environmental Justice, EPA Region 8. The Order is based on the findings of violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a), which, among other things, prohibits the discharge of pollutants (e.g., dredged or fill material) into waters of the United States except as in compliance with section 404 of the CWA, 33 U.S.C. § 1344.

II. FINDINGS OF VIOLATION

2. Respondent Patrick Goggins is an individual residing in or near Billings, Montana. At all relevant times, Respondent Vermilion Ranch Co. was a corporation organized under the laws of the State of Montana.

3. At all relevant times, Respondents owned, controlled and or operated property located near the midpoint of Section 6, Township 2 North, Range 28 East, Yellowstone County, Montana containing a portion of the Yellowstone River (the “Site”).

4. In or around February and March 2003, Respondents discharged or caused to be discharged at the Site, without prior authorization from the United States Army Corps of Engineers (“Corps”), approximately 500-600 linear feet of fill material, including but not limited to large concrete slabs and other soil and debris, into the Yellowstone River and on the Yellowstone River’s banks below and above the river’s ordinary high water mark (“OHWM”).

5. The Yellowstone River is tributary to the Missouri River. The Yellowstone and Missouri Rivers are, and were at all relevant times, navigable, interstate waters.

6. On April 8, 2003, personnel from the Montana Department of Fish, Wildlife and Parks inspected the Site and observed the concrete slabs and other soil and debris in and on the bank of approximately 500-600 linear feet of the Yellowstone River.

7. On May 1, 2003, the Corps sent a letter to Respondent Patrick Goggins advising Mr. Goggins that the Corps had become aware of the unauthorized discharges described in paragraph 4 of Section II of this Order and directing Mr. Goggins to cease and desist any further unauthorized work or development at the Site. On May 14, 2003, the Corps sent Mr. Goggins a follow-up letter requesting that Mr. Goggins advise the Corps that he would take steps to remedy the unauthorized discharge.

8. On June 23, 2003, the Montana Department of Environmental Quality sent a letter to Mr. Goggins advising him that the unauthorized discharges described in paragraph 4 of Section II of

this Order also constituted a violation of the Montana Water Quality Act, Section 75-5-605 and directing Mr. Goggins to take steps to remedy the violation.

9. The activities described in paragraph 4 of Section II of this Order were performed using common earthmoving vehicles and equipment, including a front-end loader owned by Respondents, a dump truck, and a tracked hoe, all of which were operated by Respondents and/or by one or more individuals on behalf of Respondents.

10. The Yellowstone River bank area that was filled and disturbed by the actions of Respondents described in paragraph 4 of Section II of this Order provided various functions and values, including wildlife habitat for songbirds, raptors, mammals, reptiles and amphibians; water quality enhancement; flood storage; and food chain support.

11. Respondents are each a "person" within the meaning of section 502(5) of the CWA, 33 U.S.C. § 1362(5).

12. The discharged fill materials described in paragraph 4 of Section II of this Order are, and were at all relevant times, "fill material" within the meaning of 33 C.F.R. § 323.2(e) and "pollutants" within the meaning of section 502(6) of the CWA, 33 U.S.C. § 1362(6).

13. The vehicles and equipment described in paragraph 9 of Section II of this Order are, and were at all relevant times, each a "point source" within the meaning of section 502(14) of the CWA, 33 U.S.C. § 1362(14).

14. The Yellowstone and Missouri Rivers and the banks of the Yellowstone River at or below the OHWM referenced in paragraph 5 of Section II of this Order are, and were at all relevant times, "waters of the United States" within the meaning of 33 C.F.R. § 328.3(a) and therefore "navigable waters" within the meaning of section 502(7) of the CWA,

33 U.S.C. § 1362(7). Pursuant to 33 C.F.R. § 328.4(c)(1), the OHWM defines the limits of the Corps' jurisdiction over non-tidal waters in the absence of adjacent wetlands.

15. The placement of fill material into and on the banks of the Yellowstone River at or below the OHWM constitutes the “discharge of pollutants” within the meaning of section 502(12) of the CWA, 33 U.S.C. § 1362(12).

16. Section 301(a) of the CWA, 33 U.S.C. § 1311, prohibits, among other things, the discharge of pollutants by any person into waters of the United States except as in compliance with section 404 of the CWA, 33 U.S.C. § 1344.

17. Section 404 of the CWA, 33 U.S.C. § 1344, sets forth a permitting system authorizing the Secretary of the Army, acting through the Chief of Engineers of the Corps, to issue permits for the discharge of dredged or fill material into the navigable waters, i.e., waters of the United States.

18. 33 C.F.R. § 323.3(a) specifies that, unless exempted pursuant to 33 C.F.R. § 323.4, a permit issued by the Corps is required for the discharge of dredged or fill material into waters of the United States.

19. Respondents are not and never have been authorized by a permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344, to conduct any of the activities described in paragraph 4 of Section II of this Order.

20. Respondents' activities described in paragraph 4 of Section II of this Order violate section 301 of the CWA, 33 U.S.C. § 1311. Each discharge of pollutants from a point source by Respondents into waters of the United States without the required permits issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344, constitutes a violation of section 301(a) of the CWA,

33 U.S.C. § 1311(a). Each day the discharges remain in place without the required permits constitutes an additional day of violation of section 301(a).

21. The removal of the fill material illegally discharged into waters of the United States at the Site and restoration of the impacted waters to a condition that closely approximates their condition and function prior to the discharge of the fill material, can be achieved as a practical matter through commonly used methods of construction, digging, filling, revegetation, and best management practices.

22. Activities to be carried out under this Order are remedial, not punitive, and are necessary to achieve the CWA's objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," as specified in section 101(a) of the CWA,

33 U.S.C. § 1251(a). The removal and restoration described in paragraph 21 of Section II of this Order are appropriate to alleviate actual and potential harm to water quality, aquatic habitat, and wildlife habitat caused by Respondents' unpermitted activities.

23. This Order was issued after consultation and coordination with the Corps' Omaha District, Helena Regulatory Office.

III. ORDER

Based upon the foregoing FINDINGS OF VIOLATION, and pursuant to the authority vested in the Administrator of the EPA pursuant to sections 308 and 309(a) of the CWA,

33 U.S.C. §§ 1318 and 1319(a), as properly delegated to the Assistant Regional Administrator of the Office of Enforcement, Compliance and Environmental Justice, EPA Region 8, it is hereby ORDERED:

1. Respondents shall immediately terminate all discharges of dredged or fill materials into waters of the United States, now and in the future, unless specifically authorized by the Corps under a valid permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344. This prohibition includes all bank stabilization, mechanical land clearing, dredging, filling, grading, leveling, installation of utilities, construction, and any other activities that result in a discharge of dredged or fill material into waters of the United States.

2. Within forty-five (45) calendar days of the receipt of this Order, Respondents shall submit to EPA for review and approval a Restoration Plan for the removal of the discharged fill materials described in paragraph 4 of Section II of this Order and restoration of the area impacted by the discharged fill. The Restoration Plan shall be prepared in accordance with “U.S. Environmental Protection Agency - Region VIII Section 404 Enforcement: General Guidelines for Removal and Restoration Plans,” attached hereto as Exhibit A. Additionally, the Restoration Plan shall:

a. Include a detailed work plan and schedule for all of the work to be accomplished by the Restoration Plan, including the application for any required permits, providing for completion of all aspects of the restoration work no later than August 1, 2004. The work plan shall, at a minimum, provide specific and detailed provisions for:

i. Removal of the fill materials discharged above and below the OHWM to upland areas in full compliance with and with prior approval of all Federal, State and local requirements, and providing a detailed description (including exact location) of the

site to where the material will be relocated and proof that the owner of such site has approved the relocation of the discharged fill materials to such site;

ii. Stabilization of any fill material which is placed adjacent to waters of the United States to prevent incidental movement of this material into such waters; and

iii. Revegetation of the areas of the Yellowstone River bank impacted by the unauthorized discharges described in paragraph 4 of Section II of this Order with plants indigenous to the area which will prevent or reduce erosion of the river bank. The revegetation component of the plan must contain grasses, forbs, and shrubs, and may contain tree species.

b. Be prepared by a qualified hydrologist/engineer experienced in stream and wetland restoration, include detailed professional drawings of the restoration site, including plan and profile drawings with control elevations, and comply with all Federal, State, and local requirements; and

c. Be prepared in accordance with “Nationwide Permits, Regional Conditions, State of Montana, Omaha District - Corps of Engineers,” effective March 18, 2002, attached to this Consent Order as Exhibit B, and “Special Public Notice - Reissuance of the Generic Prohibitions Regarding the Use of Certain Materials as Fill in Waters of the United States,” issued August 4, 2003, attached to this Consent Order as Exhibit C.

3. EPA will review the Restoration Plan and approve it or reject it with comments. If EPA rejects the Restoration Plan, Respondents shall, within fifteen (15) calendar days of receipt of EPA’s rejection letter, submit a revised plan that corrects the deficiencies identified by EPA.

4. Upon receiving EPA's written approval of the Restoration Plan, Respondents shall obtain all necessary permits to implement the EPA-approved plan and then commence restoration activities in accordance with the approved plan, including the time frames specified therein, and all granted permits. Respondents shall demonstrate that all necessary permits have been granted by providing complete copies of all such permits, and any amendments thereto, to EPA within seven (7) calendar days of issuance of each permit.

5. This Order is not a permit or an authorization to place or discharge dredged or fill material in waters of the United States. Respondents shall consult with the Corps at the following address and telephone number to determine if any work to be performed pursuant to this Order requires a permit from the Corps under section 404 of the CWA:

U.S. Army Corps of Engineers, Omaha District
Helena Regulatory Office
10 West Fifteenth Street, Suite 2200
Helena, Montana 59626
Telephone: (406) 441-1375

If required, Respondents shall obtain such permit(s) and provide a copy to EPA pursuant to paragraph 4 of Section III of this Order prior to initiating any work that is to be performed pursuant to this Order.

6. At least ten (10) calendar days prior to the anticipated completion of all restoration activities in accordance with the approved Restoration Plan, Respondents shall notify EPA so that EPA can arrange a final interagency inspection of the completed restoration activities.

7. Respondents shall submit three (3) copies of the Restoration Plan, all notifications, and related correspondence to:

Kristine Knutson

U.S. Environmental Protection Agency
10 West Fifteenth Street, Suite 3200
Helena, Montana 59626
Telephone: (406) 457-5021
Facsimile: (406) 457-5055

A copy of the restoration plan, all notifications, and related correspondence shall also be provided to:

Sheldon H. Muller, 8ENF-L
U.S. Environmental Protection Agency, Region 8
999 18th Street, Suite 300
Denver, CO 80202-2466
Telephone: 303-312-6916
Facsimile: 303-312-6953

8. Any deliverables, plans, reports, specifications, schedules, and attachments required by this Order are, upon approval by EPA, incorporated into this Order. Any non-compliance with such EPA-approved deliverables, plans, reports, specifications, schedules, and attachments shall be deemed a failure to comply with this Order and subject to EPA enforcement.

9. Respondents shall allow, or use their best effort to allow, access by any authorized representatives of EPA, the Corps, the Natural Resources Conservation Service, the U.S. Fish and Wildlife Service, the Soil Conservation Service, the Montana Department of Environmental Quality, the Montana Department of Fish, Wildlife and Parks and the Yellowstone County Conservation District, or any of these agencies' contractors, upon proper presentation of credentials, to sites and records relevant to this Order for any of the following purposes:

- a. To inspect and monitor progress of the activities required by this Order;
- b. To inspect and monitor compliance with this Order; and
- c. To verify and evaluate data and other information submitted to EPA.

This Order shall in no way limit or otherwise affect EPA's authority, or the authority of any other governmental agency, to enter the Site, conduct inspections, have access to records, issue notices and orders for enforcement, compliance, or abatement purposes, or monitor compliance pursuant to any statute, regulation, permit, or court order.

10. This Order shall be effective upon receipt. Within five (5) calendar days of receipt of this Order, Respondents shall inform EPA in writing of Respondents' intent to fully comply with the Order.

11. Please be advised that section 309(d) of the CWA, 33 U.S.C. § 1319(d), as modified by the Civil Monetary Penalty Inflation Adjustment Rule, 69 Federal Register 7121 (February 13, 2004), authorizes civil penalties of up to \$32,500 per day for each violation of section 301 of the CWA, 33 U.S.C. § 1311, and for each violation of an order issued by the Administrator of EPA under section 309(a) of the CWA, 33 U.S.C. § 1319(a). Additionally, section 309(g) of the CWA, 33 U.S.C. § 1319(g), authorizes EPA to impose administrative penalties for violations of the CWA. Further, section 309(c) of the CWA, 33 U.S.C. § 1319(c), authorizes fines and imprisonment for willful or negligent violations of the CWA. Issuance of this Order shall not be deemed to be an election by the United States to forego any civil or criminal action to seek penalties, fines, or other appropriate relief under the CWA for violations giving rise to the Order.

12. Compliance with the terms and conditions of the Order shall not be construed to relieve Respondents of their obligation to comply with any applicable federal, state or local law. Failure

by Respondents to complete the tasks described herein in the manner and time frame specified pursuant to this Order may subject Respondents to a civil action under section 309 of the Clean Water Act, 33 U.S.C. section 1319, for violation of this Order.

DATED this 10TH day of June, 2004.

SIGNED

Carol Rushin
Assistant Regional Administrator
Office of Enforcement, Compliance
and Environmental Justice

**IF YOU WOULD LIKE COPIES OF THE ATTACHMENTS, PLEASE CONTACT THE
REGIONAL HEARING CLERK.**

THIS DOCUMENT WAS FILED IN THE RHC'S OFFICE ON JUNE 15, 2004.